No.

92-1541

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LILLIAN MCCOVEY SHERMOEN, ET AL.,

Petitioners.

V.

UNITED STATES OF AMERICA; THE UNITED STATES DEPARTMENT OF INTERIOR, BUREAU OF INDIAN AFFAIRS; BRUCE BABBITT, Secretary of the Interior; EDDIE BROWN, Assistant Secretary of the Interior/Indian Affairs; RONALD M. JAEGER, Area Director, Sacramento Office, Bureau of Indian Affairs; VIRGIL AKINS, Superintendent, Northern California Agency, Bureau of Indian Affairs; DALE RISLING, SR., ROBERT D. HOSTLER, CLIFFORD LYLE MARSHALL, and JOHN M. SCOTT.

Respondents.

Petition For a Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Could the district court decide the constitutionality of the Hoopa-Yurok Settlement Act of 1988 in an action against the United States, when Indian tribes affected by the statute were not also defendants?

2. Does the public rights exception to usual rules of joinder under Fed.R.Civ.P. 19 permit a constitutional challenge to a federal statute in the absence of an Indian tribe that claims benefits from that statute?

3. Does Indian tribal sovereign immunity prevent a suit against tribal officials when only equitable relief is sought, the officials' only claim to lawful authority for their actions is an allegedly unconstitutional federal statute, and the litigation's only purpose is to challenge that statute?

PARTIES BELOW

Plaintiffs-petitioners herein: Lillian McCovey Shermoen; Carol Leigh McConnell Ammon; Leslie Ammon; Elsie McCovey Bacon; Gaylon Robert Bacon; Joseph K. Bacon; Raymond E. Bacon; George Clifford Bailey, Sr.; Ethel Mae Blake; Clarann C. (Ragain) Bray; Mary L. Carroll; Ora Collins; Dennis Costa; Joanne Barbara Wilder Costa; Barney Alva Curtice; Frank Benjamin Dowd; Gerald Ieshh Dowd; Kathy Noreen Dowd; Rocky Twa-Gah Dowd; Venola Dowd; Ollie Roberts Sorrell Foseide; Eileen Renee (Ragain) George; Frank Gist; Bonita Bacon Green; Janice Marie Greene; Earl Griffith; Colleen Guido; Dorothy Harriett Williams Haberman; Richard Lee Haberman; Mary Louise Hall; Evelina Hoffman; Linda Lee Hoffman; Virginia Howerton; Martin Kinder; Rachel Louise Knight; Pauline Rogers Kothman; Axel Roderick Lindgren; Marilyn Kay Lunsford; Ardith Evelyn McConnell; Howard Duane McConnell; Michael McConnell; Robert Brian McConnell; Allen McCovey, Sr.; Beatrice Violet McCovey; Darrell McCovey; Frank Lynn McCovey; James L. McCovey; Loren Gerhad McCovey; Vada Norma John McCovey; Vlayn Dene Harvill McCovey; David Edgar McLaughlin; Thelma Wilma McLaughlin; Gertrude Viola Mollier; Carol Griffith Moon; Edward Michael Moore; Lena Isle Nicholson; David O'Neill; Ellen J O'Neill; Herbert Lincoln O'Neill; Barbara D. Orcutt; Lawrence E. Orcutt; Bernice Jean Roubidoux; Darlene Marie Roubidoux; Peggy Joyce Sanderson, John Denton Simpson, II; Vivian Kay Simpson; Alberta Sylvia; Maria Eileen Tripp; Georgiana Trull; Lena Cleveland Wilder; the Coast Indian community of Yurok Indians of the Resighini Rancheria, a federally-recognized tribe.

Of the above-named individuals, Clarann C. (Ragain) Bray, Allen McCovey, Sr., and Vada Norma John McCovey, are deceased. They were plaintiffs when the action was filed on August 28, 1990, in United States District Court

Defendants-appellees-respondents are named in the caption.

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No. 92-

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v.

United States of America; The United States Department of Interior, Bureau of Indian Affairs; Bruce Babbitt, Secretary of the Interior; Eddie Brown, Assistant Secretary of the Interior/Indian Affairs; Ronald M. Jaeger, Area Director, Sacramento Office, Bureau of Indian Affairs; Virgil Akins, Superintendent, Northern California Agency, Bureau of Indian Affairs; Dale Risling, Sr., Robert D. Hostler, Clifford Lyle Marshall, and John M. Scott.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, the Coast Indian Community of Yurok Indians of the Resighini Rancheria, a federally-recognized Indian tribe, and individual Indians of the former joint Hoopa Valley Reservation in California, request a writ of *certiorari* to review the judgment and opinion entered by the United States Court of Appeals for the Ninth Circuit in this action on December 24, 1992.

OPINIONS BELOW

The onion of the court of appeals is reported at 982 F.2d 1312 (9th Cir. 1992) and is reprinted in the Appendix (App. A, *infra*). The judgment and opinion of the United States District Court for the Northern District of California entered May 24, 1991, and that court's July 10, 1991, order from the bench denying petitioners' motion for leave to amend, are not reported, but they are also reproduced in the Appendix (App. B, *infra*).

JURISDICTION

This Court's jurisdiction is pursuant to 28 U.S.C. §1254 (1).

RULES, CONSTITUTIONAL PROVISIONS, AND STATUTES INVOLVED

1. Rule 19 of the Federal Rules of Civil Procedure is reproduced in full in the Appendix (App. C, infra).

2. The United States Constitution provides in Article I, § 8, clause 3:

> The Congress shall have power. . .to regulate commerce . . . with the Indian tribes. . .

Amendment I provides:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment V provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. The Hoopa-Yurok Settlement Act of 1988, P.L. 100-580, as amended by P.L. 101-301 (25 U.S.C. § 1300i, *et seq.*) is set forth in full in the Appendix (App. D, *infra*).

STATEMENT

In this action, the court of appeals affirmed the dismissal of petitioners' challenge to the constitutionality of the Hoopa-Yurok Settlement Act (the "Act"). The Act split the Hoopa Valley Reservation in northern California, giving the Hoopa Valley Tribe exclusive rights in approximately 90,000 contiguous acres of timber land, which constitutes 96 per cent of the total unallotted acreage held in trust in the former joint reservation.[1]

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[1]Before the split, the reservation was shaped like a "square skillet with an extraordinarily long handle." *Short v. United States*, 486 F.2d 561, 562 (Ct. Cl. 1973), *cert. denied* 416 U.S. 961, *reh. denied*, 417 U.S 959 (1974) *("Short")*. A map of the reservation as it existed pre-Act appears in App. E, *infra;* the same map is reproduced in the appendix to the Court's opinion in *Mattz v. Arnett*, 412 U.S. 481 (1973).

The Act also radically reordered tribal membership and tribal government for most of the Indians of the reservation, even coercing Indians of one tribe to join a second tribe or else lose all reservation rights. Petitioners allege that Congress thereby deprived them of political and property rights in violation of the Indian Commerce Clause (Art. I, § 8, cl. 3), and the right to freedom of association, the rights to due process and equal protection, and the prohibition against taking of property for a nonpublic purpose.

The court of appeals held that the action could not proceed in the absence of the Hoopa Valley Tribe and the Yurok Tribe, because the absent tribes were indispensable parties which could not be joined because of their sovereign immunity, and that in "equity and good conscience" the suit must be dismissed under Fed.R.Civ.P. 19. The court rejected petitioners' arguments that the United States could adequately represent the absent tribes' interests, and that four present or former members of the Hoopa Valley Tribal Council, the Hoopa Valley Tribe's governing body, who had intervened as defendants, could adequately represent their tribe's interests. The court held that the public rights exception to Rule 19 does not apply in this action despite the fact that all of petitioners' claims are based on the Constitution. Finally, the court denied petitioners' request to amend their complaint by naming the Yurok Tribe and tribal officers of both the Hoopa Valley and Yurok tribes as defendants in order to cure the supposed defect of parties.

The Hoopa Valley Reservation was established in accordance with the Act of April 8, 1864 (13 Stat. 39, *et seq.*), which authorized the President to create up to four reservations in California. Numerous tribes, bands, and groups of Indian people were located there; it was not established for any single tribe in particular. Before the Hoopa-Yurok Settlement Act, all Indians of the reservation communally enjoyed equal rights in the entire reservation's unallotted trust lands and resources. An Indian of the reservation's rights did not depend on whether his or her particular tribe was politically organized and/or federally-recognized.

In 1950, a minority of Indians of the reservation, including members of various tribes, organized a single political tribal group, the Hoopa Valley Tribe, which the federal government then recognized as an Indian tribe. *Hoopa Valley Tribe v. United States*, 596 F.2d 435, 441 (Ct. Cl. 1979). (Hoopa Valley Tribe not a tribe from time immemorial.) This small group adopted intricate membership rules designed to exclude most of the Indians of the reservation. The majority of the excluded group belonged to the federally recognized (but politically unorganized) Yurok Tribe[2]; the ratio of persons in the excluded group to members of the Hoopa Valley Tribe, according to Bureau of Indian Affairs (BIA) statistics, is approximately 2:1. *See id.* at 440. Yuroks have always lived on all parts of the former joint reservation. *See Short v. United States*, 486 F.2d at 564-66.

The Hoopa Valley Tribe unsuccessfully argued in actions in the Court of Claims and United States District Court over the years that it had sole title to the Square, but the courts uniformly rejected such arguments:

> The Yuroks were co-beneficiaries with the Hoopas on a per capita, equal basis of the trust [*i.e.*, the reservation's unallotted trust lands, resources, and resource revenues] administered by the United States.

Hoopa Valley Tribe v. United States, 596 F.2d at 442.[3]

The Act's basic purpose was to benefit the Hoopa Valley Tribe with property and funds, as Congress often benefits other politically favored special interest groups. In splitting

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[2]Yuroks are also referred to as Klamath River Indians. *Mattz v. Arnett*, 412 U.S. at 484.

[3]In its opinion below, the court of appeals misleadingly implies that *Short* and related litigation was unsettled, so that Congress had to enact legislation to resolve issues that were in dispute. App. A at 3a, 6a. On the contrary, the Claims Court had finally decided all essential issues that relate to the question of who owned the reservation. *Hoopa Valley Tribe v. United States*, 596 F.2d at 437 (*Short* has *res judicata* and collateral estoppel effect). The Act deliberately overturned this settled law, to give the Hoopa Valley Tribe valuable property to which it was not entitled under the court decisions.

the reservation, Congress gave the Hoopa Valley Tribe sole ownership of the heavily-timbered 144-square mile "Square," including the 90,000 acres mentioned above. In contrast, the split left the mostly Yurok majority group with approximately 3,600 acres of land in small, fragments in an area along the Klamath River known as the "Extension" or "Addition." The Yuroks and others in the majority group were neither provided nor promised compensation by Congress for this total confiscation of their rights in the "Square."[4]

Without Yurok consent, the Act arbitrarily sets membership requirements for the Yurok Tribe so that persons with no Yurok ancestry whatsoever must be allowed to join. Under the Act, the Hoopa Valley Tribal Council participates in deciding who may qualify for the so-called "Settlement Roll," and thus who may be included on the initial membership roll of the Yurok Tribe. 25

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[4]Petitioners allege that this case involves a taking of petitioners' property for a non-public purpose; that is, the taking benefits the Hoopa Valley Tribe in particular, as opposed to the public in general. No compensation will adequately remedy such takings; they are flatly prohibited. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984). Thus petitioners do not have an adequate remedy in the Claims Court, contrary to what the court of appeals seems to suggest. App. A at 15a. But the Ninth Circuit would use Rule 19 to preclude judicial review in United States District Court, thus making the prohibition against non-public purpose takings worthless because it cannot be enforced.

Even if the Act is construed to effect a public-purpose taking, it violates the fifth amendment because it fails to provide a means for obtaining just compensation. *See Preseault v. I.C.C.*, 494 U.S. 1, 11 (1990) (fifth amendment requires Congress to provide reasonable, certain, and adequate provision for compensation at time of taking). Uncompensated takings are unconstitutional. *See Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 297, n. 40 (1981), citing *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 94, n. 39 (1978), *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125-36 (1974), *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697, n. 18 (1949). The Act precludes monetary relief for a taking through an elaborate and cynical scheme whereby the affected Indians are deemed to waive their rights. *E.g.*, 25 U.S.C. § 1300i-5(c)-(d). The Act coerces the Yurok Tribe itself to waive any compensation claim. 25 U.S.C. § 1300i-1(c)(4). Thus, the Act is intended to deny petitioners a Claims Court remedy for a public purpose taking.

To be sure, the Yurok Tribe has not waived its claims, but it is thus deprived of significant funds and organizational authority that depend on a

U.S.C. § 1300i-4(d)-(e) (initial membership roll of Yurok Tribe limited to persons listed on Settlement Roll).[5] Congress dictated a form of government for the Yurok Tribe, including the number of persons (five) who shall comprise the "interim" tribal council, and the scope of tribal business that this council may conduct. 25 U.S.C. § 1300i-8. Congress also dictated that persons who do not join the Yurok Tribe would lose all rights in the Extension that they formerly enjoyed, whereas before the Act, neither membership in the Yurok nor any other particular tribe was necessary for an Indian of the reservation to enjoy such rights.

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waiver of claims. The funds that are being withheld are the reservation timber revenues that the BIA escrowed for the Yuroks beginning in 1974, as explained in *Hoopa Valley Tribe v. United States*, and to which the court of appeals refers. App. A- at 5a. Thus, the funds are not compensation for a taking; they are part of the property that Congress has taken from the Yuroks in the Act.

There are currently two cases pending in the Claims Court alleging that the Act is a taking of Yurok property: *Yurok Tribe v. United States* (no. 92-173L), and *Ammon v. United States* (no. 91-1432L). These actions do not change the point made above that the Claims Court is an inadequate forum for petitioners' grievances.

This case should not be viewed as primarily a takings case. Petitioners' taking claims are substantial and important, but so are petitioners' other constitutional claims, based on the Due Process Clause, the right to freedom of association under the first amendment, and the limitations on congressional power inherent in the Indian Commerce Clause. The violations of petitioners' rights based on these constitutional provisions are not remediable in the Claims Court. In leaving plaintiffs without a remedy, the court of appeals slighted a basic policy underlying Fed. R. Civ. P. 19(b), which is that an action should not be dismissed for non-joinder if that would leave the plaintiffs without an adequate remedy.

[5]Petitioners allege that it violates the Due Process Clause to include the Hoopa Valley Tribe's governing council in the decision-making process regarding the Settlement Roll. The Hoopa Valley Tribe has a direct financial interest in limiting the number of persons who qualify for the Settlement Roll. The fewer persons who qualify, the more money the Hoopa Valley Tribe gets from the "Settlement Fund." 25 U.S.C. § 1300i-3(c). *See Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813 (1986) (judge with direct financial stake in the outcome of a decision is disqualified from participating, or else the decision must be vacated).

The Act is especially harsh in dealing with the pre-existing rights of members of petitioner Coast Indian Community to use and benefit from the Extension in particular, for it requires members of this federally-recognized tribe to join a second tribe, the Yurok Tribe, or lose all such rights. Thus, the Act deprives Yurok tribal members and non-members alike of their invaluable right to self-determine tribal membership, their right to self-govern, and their right to significant economic opportunities that came from the reservation lands, resources, and funds that Congress took away.

On August 28, 1990, the present action was filed in the United States District Court for the Northern District of California for declaratory and injunctive relief to invalidate the Act as unconstitutional.[6] The defendants, respondents here, are the United States, the BIA, the Secretary of the Interior, and subordinate BIA officials responsible for administering the Act. On November 19, 1990, four members of the Hoopa Valley Tribal Council filed an answer in intervention and counter-claimed for "slander of title," that being the Hoopa Valley Tribe's so-called title to the Square. These intervenors specifically identified the "financial interests of the Tribe and its members" among the interests that they sought to vindicate. They also are respondents here.

The court of appeals correctly characterized the nature of petitioners' claims:

> Appellants assert that, by extinguishing their interest in in the Square and conferring exclusive right to the Square on the Hoopa Valley Tribe, the Act effects a taking of property for a non-public purpose and without just compensation in violation of the Fifth Amendment. They also allege a violation of their First Amendment right of freedom of association in that the Act allegedly forces Native Americans of diverse tribal affiliations to associate

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[6]Lower court jurisdiction is pursuant to 28 U.S.C. § 1331 (general federal questions) as to all petitioners, and also is pursuant to 28 U.S. C. § 1362 (suits by federally-recognized Indian tribes) as to petitioner Coast Indian Community of Yurok Indians of the Resighini Rancheria.

> in a single, politically determined tribe in order to retain their interest and rights in the reservation. See 25 U.S.C. § 1300i-5(d) (3). Appellants also contend that Congress exceeded its constitutional authority to govern the Indian Tribes by dictating tribal membership, forms of tribal government, and means of tribal organization, and by interfering with the sovereignty of the Coast Indian Community of the Resighini Rancheria. Finally, appellants charge that the Act derogates their Fifth Amendment right to equal protection of the law by illegitimately preferring members of the Hoopa Valley Tribe over other Indians of the reservation.

App. A at 6a.

The declaratory and injunctive relief that petitioners seek would prevent the BIA from implementing the Act, from treating the reservation as other than a single, unified reservation, and from pursuing policies favoring the Hoopa Valley Tribe to the detriment of petitioners and other Indians of the reservation who do not belong to that tribe. The action does not include any claim for money damages. The requested relief does not require the disposition of sovereign property, but only requires that the joint reservation be administered in accordance with pre-Act law and the Constitution.

REASONS FOR GRANTING THE PETITION

I. THIS CASE RAISES IMPORTANT ISSUES ABOUT THE POWER OF FEDERAL COURTS TO REVIEW THE CONSTITUTIONALITY OF ACTS OF CONGRESS AFFECTING INDIAN SOVEREIGNTY AND LANDS.

The court of appeals' decision raises three important issues for Indians and non-Indians alike: (1) Should Fed.R.Civ.P. 19 be interpreted to prevent courts from reviewing unconstitutional federal legislation when the legislation benefits an Indian tribe; (2) does the public rights exception to usual rules of joinder under Rule 19[7] permit a constitutional challenge to a

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[7]*See National Licorice Co. v. NLRB*, 309 U.S. 350, 363 (1940), discussed in § III, *infra*.

federal statute in the absence of Indian tribes who claim benefits from the statute; and (3) does tribal sovereign immunity preclude suits against tribal officials acting pursuant to an unconstitutional federal statute? This Court has never squarely addressed these questions.

The right to judicial review of federal statutes affecting Indian tribes is unsettled; the court of appeals' decision makes the very existence of that right questionable. The court of appeals applied Rule 19 so as to preclude any such review. It made a remarkable admission: "We realize that our decision effectively denies [petitioners] a forum . . ." for their constitutional grievances. App. A at 15a. Such a decision is possible only because the court of appeals departed sharply from standards that should govern the lower courts in deciding necessary and indispensable party status.

The court of appeals' strained interpretation of Rule 19 forecloses judicial review of legal issues of great concern to all Indian tribes. A legally protected land base and a strong tribal government are essential to the cultural and political survival of Indian tribes today. Moreover, the federal government must necessarily rely on tribal governments for the effective administration of federal policy. The court of appeals' decision undermines these important federal interests by denying judicial review when acts of Congress deprive tribes of their land and abrogate their sovereignty.

Judicial review of congressional acts affecting tribes is also important for non-Indians to prevent Congress from abusing its power, especially where lands and resources are concerned. The court of appeals' rationale would insulate any number of congressional actions from judicial scrutiny (and the protection for the public that judicial review ensures) when such actions, even if only marginally, benefit a tribe, because tribes are said to be indispensable parties, and they cannot be sued unless they consent. For example, Congress is presently studying a controversial proposal to transfer 500,000 acres near Flagstaff, Arizona to the Hopi Tribe, including federal, state and private holdings as part of a final settlement of the so-called Hopi-Navajo

dispute.[8] This proposal, if enacted, would not be reviewable under the court of appeals' rationale unless both of the affected tribes consented to be sued. Such joint consent may be unlikely.

The questions this case presents go to the heart of the separation of powers. The court of appeals' decision effectively turns all questions about federal statutes that affect Indian tribes into non-justiciable political questions. This is at odds with the federal judiciary's long-settled authority to review the constitutionality of all congressional acts. Congressional enactments concerning Indian tribes are reviewed on constitutional grounds. *Delaware Tribal Business Committee v. Weeks,* 430 U.S. 73, 84-85 (1977). The political question doctrine does not apply to relations between Congress and the Indian tribes. *United States v. Sioux Nation,* 448 U.S. 371, 413 (1980). Certainly, Fed.R.Civ. P 19 cannot be the basis for an exception to this rule.

At bottom, the court of appeals' decision in the present case is simply unfair. The government here has diminished petitioners' rights in land (*i.e.,* the former Hoopa Valley Reservation in which all Indians of the reservation, and not just Hoopa Valley Tribe members, had equal rights). It has forced them to associate for political purposes in ways that they did not choose, dictating tribal membership and the structure and scope of tribal government. Immunizing these congressional actions from judicial review is inconsistent with the courts' treatment of such actions concerning non-Indian property and political rights. No such disparity should be tolerated by this Court.

II. THE COURT OF APPEALS CREATED A NEW RULE WHICH PRECLUDES SUITS FOR INJUNCTIVE RELIEF AGAINST TRIBAL OFFICIALS ACTING PURSUANT TO UNCONSTITUTIONAL STATUTES.

The court of appeals has created an exception to the rule that government officers generally are subject to equitable remedies in federal court when their activities violate federal law. Specifically, the exception is for tribal government

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[8]Benedek, *No More War Forever,* **Newsweek,** March 8, 1993, at 58.

officials. The court of appeals held that tribal sovereign immunity precludes suits against tribal officials when the requested relief would create an "intolerable burden on [tribal] governmental functions." App. A at 14a. For the court of appeals, this exception applies even when tribal officials act under an unconstitutional federal statute. There is no basis for this exception in Supreme Court precedent, nor should there be such an exception -- certainly not one that depends on an "intolerable burden" test.

Review by this Court is needed to clarify that tribal sovereign immunity does not preclude suits against Indian tribal officials when only equitable relief is sought, their only claim to lawful authority for their actions is an allegedly unconstitutional federal statute, and the sole purpose of the litigation is to challenge that statute. Tribal officials must be accountable the same as other government officials are accountable.

The rule permitting officer suits for injunctive relief "emerged from harsh reality" in the common law. *See* 12 J. Moore, H. Bendix, B. Ringle, *Moore's Federal Practice* para. 300.03 [4-1] (1990). It rests on a legal fiction that suits against officers are not against the sovereign; if this fiction had not developed, the king would have been unaccountable to his subjects. *Id.* In *Ex parte Young*, 209 U.S. 123 (1908), this Court held that state officials are not immune from suits to enjoin the implementation of unconstitutional statutes, the theory being that a state official could not be immunized for performing an act that the state itself was powerless to perform, and therefore the suit is not a suit against the sovereign. *See also, Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S 682, 690 (1949) (in suits alleging unconstitutional action, "the conduct against which specific relief is sought is beyond the officer's powers and, is therefore, not the conduct of the sovereign.").

This Court suggested that the *Ex parte Young* doctrine applies to tribal officials in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1977), holding that an officer of a tribal pueblo is subject to suit for *habeas corpus* relief under the Indian Civil

Rights Act, 25 U.S.C. § 1301-1303. A straightforward application of the *Ex parte Young* rule in the case at bar would cure any defect of parties, if, *arguendo*, one assumes there was such a defect. But the district court and court of appeals concluded that the rule does not apply because it violates tribal sovereign immunity.[9]

The court of appeals employed a balancing test that forecloses injunctive suits if they would create intolerable burdens on tribal government functions. This is not the law in any other circuit.[10] The court of appeals' novel formulation of the officer suit doctrine is so vague that it cannot be applied evenhandedly. This Court's guidance is needed to correct the

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[9]This holding was possible notwithstanding *Santa Clara Pueblo* because *Ex parte Young* was not a *habeas corpus* action, so the Court's reference to *Ex party Young* in *Santa Clara Pueblo* can be read as *dictum*. But the court of appeals' holding is illogical and sets a dangerous precedent. Judge Norris said in *State of California v. Harvier*, 700 F.2d 1217, 1224 (9th Cir. 1983) (Norris, J., dissenting), "Although I am hesitant to construe *Martinez* as a clear holding that *Ex parte Young* applies to Indian tribes . . . both public policy and that the jurisprudence of sovereign immunity compel that result." Indeed, in *Oklahoma State Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*,_____U.S._____, 111 S.Ct. 905, 912 (1991) (Stevens, J., concurring), it was suggested that sovereign immunity does not bar suits against even the tribe itself when only equitable relief is sought.

[10]The Ninth Circuit's theory apparently derives from *State of Washington v. Udall*, 417 F.2d 1310, 1318 (9th Cir. 1969). It is not grounded in this Court's opinions. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691, n. 11 (1949), refers to a narrow class of actions which may fail "if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." But nowhere is this limitation said to be subject to a balancing test. *See also Dugan v. Rank*, 372 U.S. 609, 620-21 (1963). Although the Court has barred officer suits that would "stop the government in its tracks," *id.*, this simply means that courts may not interfere with the exercise of discretion by officials who are lawfully empowered to exercise it; it does not mean that officials may violate federal constitutional rights if an order requiring them to stop would be an "intolerable burden." At any rate, the petitioners here ask only that the government stop violating the Constitution; no disposition of sovereign property is involved, because the reservation will continue to operate as it did before the Act if petitioners prevail.

court of appeals' misreading of the officer suit doctrine in Indian affairs. Important rights of judicial review depend on the availability of suits against tribal officers for injunctive relief.

Unlike the Ninth, other circuits clearly allow suits to test the legality of actions by tribal officers. For example, in *Wisconsin v. Baker,* 698 F.2d 1323 (7th Cir.) *cert. denied* 463 U.S. 1207 (1983), suit was upheld to enjoin tribal officers from exercising exclusive jurisdiction over hunting and fishing in certain navigable lakes in Wisconsin. The court cited *Ex parte Young,* holding that a tribal officer is stripped of immunity "whenever he exercises a power that his tribe was powerless to convey him," such as a power to violate the Constitution, or a power beyond the scope of those delegated by the tribe. 698 F.2d at 1332.

Likewise, *Tenneco Oil Company v. Sac and Fox Tribe,* 725 F.2d 572 (10th Cir. 1984), sanctioned tribal officer suits without adopting the intolerable burden standard. The court held that tribal sovereign immunity does not preclude a suit against tribal officers to enjoin licensing and taxation ordinances, when they are alleged to have acted beyond the authority the tribal sovereign is capable of bestowing.

But the Ninth Circuit holds that tribal officials share the tribe's sovereign immunity from unconsented suit, *Imperial Granite Company v. Pala Band of Indians,* 940 F.2d 1269, 1272 (9th Cir. 1991). For all practical purposes, this eliminates officer suits in the Ninth Circuit.[11]

This Court's intervention in the present action will bring

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[11] In *Imperial Granite*, the court refused to allow an officer suit to determine whether tribal officials acted lawfully in blocking the company from its quarry on fee-patented land within the boundaries of a reservation. Another panel of the Ninth Circuit than the one that decided the case at bar appears to have held that tribal sovereign immunity does not foreclose equitable relief against tribal officials acting under color of an unconstitutional federal statute. *Burlington Northern v. Blackfeet Tribe,* 924 F.2d 899, 901 (9th Cir. 1991) *cert. denied* _____U.S._____, 112 S.Ct. 3013 (1992). However, in the present action, the court of appeals characterized this as "broad dicta." App. A at 13a. *Dictum* or not, the Ninth Circuit in *Burlington Northern* clearly understood that it had never before squarely decided whether the doctrine of *Ex parte Young* applies to tribal officials. 924 F.2d at 901.

about a uniform body of law permitting tribal officer suits where unconstitutional conduct is alleged; public policy and the jurisprudence of sovereign immunity compel this. It was error to deny petitioners' motion for leave to file an amended complaint adding the Yurok Tribe and Hoopa Valley and Yurok tribal governing officials. For this reason alone, the court of appeals' decision should be reversed.

III. THE COURT OF APPEALS FUNDAMENTALLY MISCONSTRUED THE PUBLIC RIGHTS EXCEPTION TO TRADITIONAL JOINDER RULES.

The court of appeals refused to apply the public rights exception to traditional joinder rules. The court conceded that this suit involves public rights, "[l]ike the interest in being governed by constitutional laws." App. A at 12a. But the court of appeals nevertheless refused to apply the public rights exception because the suit allegedly threatens the absent tribes' "legal entitlements." *Id.* This is a fundamental misunderstanding of the public rights exception. Review is necessary to clarify the exception and to bring the Ninth Circuit into conformity with this Court's rulings.

The public rights exception was established in *National Licorice Co. v. NLRB,* 309 U.S. 350, 363 (1940), which upheld an NLRB injunction against an employer, preventing the enforcement of contracts that constituted unfair labor practices. Notwithstanding usual joinder rules, the employees who were parties to the contracts did not have to be joined in the action. The public nature of the rights asserted -- compliance with federal fair labor laws -- justified the exception:

> In a proceeding so narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights.

Id. The public right was "distinct and separate" from the private rights under the contracts, and overrode those private rights in the sense that "[i]t will not be open to any tribunal to compel the employer to perform the acts which, even though he has bound himself by contract to do them, would violate the Board's order or be inconsistent with any part of it." *Id.* at 365.

Thus, under *National Licorice,* the public rights exception fully applies regardless of whether the public rights adjudication threatens the so-called private legal rights or entitlements of the absent parties. The court of appeals' opinion in the present case eviscerates the public rights exception because any public rights adjudication will somehow threaten the private interests or "rights" of absent parties. The court of appeals' strained interpretation flatly contradicts this Court's ruling in *National Licorice,* and, if not corrected, is likely to close the courthouse door to a wide range of significant public rights controversies.

The court of appeals' decision contains another serious analytical flaw which is inconsistent with this Court's precedents. The "legal entitlements" with which the court was concerned derive solely from the Hoopa-Yurok Settlement Act, the statute which the suit attacks; there are no independent private rights at stake. If the suit is successful and the Act is held to be unconstitutional, there are no "legal entitlements" in need of protection. Stated another way, such private rights of the absent tribes are not "rights" at all if the Act itself is unconstitutional. The court of appeals' reliance on "legal entitlements" to preclude application of the public rights exception thus begs the question.

The court of appeals' failure to apply the public rights exception is out of step with other circuits. For example, in *Kirkland v. New York State Department of Correction Services,* 520 F.2d 420 (2d Cir. 1975) *cert. denied* 429 U.S. 974 (1976), *reh. denied* 429 U.S. 1124 (1977), the exception was applied in a challenge to discrimination in a New York State Civil Service examination. The court rejected the argument that post-trial intervenors who had passed the exam were indispensable parties, so that the judgment should be vacated. The court relied on *National Licorice* for the principle that "[w]hen litigation seeks the vindication of a public right, third persons who may be adversely affected by a decision favorable to the plaintiff do not thereby become indispensable parties." 520 F.2d at 424. Thus, the public rights exception was applied despite the adverse effect the adjudication may have had on the private rights of the intervenors. The same interpretation

of *National Licorice* is found in the Eleventh Circuit. See, *Jeffries v. Georgia Residential Finance Authority,* 678 F.2d 919, 929 (11th Cir.), *cert. denied* 459 U.S. 971 (1982). Review by this Court is necessary to establish a uniform interpretation of the public rights exception and to furnish appropriate guidance to the lower courts in its application.

IV. THE COURT OF APPEALS MISCONSTRUED THE UNITED STATES' TRUST RELATIONSHIP WITH INDIAN TRIBES AND DISREGARDED THE INTERESTS INVOLVED IN THIS CASE.

The court of appeals illogically concluded that the United States' representation of the absent tribes is inadequate for Rule 19 purposes, because of the "competing interests and divergent concerns" of the absent tribes, and also because of the United States' trust responsibilities towards the absent tribes. App. A at 10a. The court of appeals reached this conclusion even though the "United States might share the same ultimate goal as the absent tribes, namely that of vindicating the constitutionality of the Act . . ." *Id.* The court of appeals' decision makes no sense, because the only controversy in this litigation is whether or not the Act is constitutional. The absent tribes' claims that are at stake all derive from the Act. Therefore, if the Act is constitutional, these claims are fully vindicated. If the Act is unconstitutional, then the absent tribes' rights allegedly derived from the Act were never rights in the first place. It is thus impossible for the United States to have a conflict with the absent tribes in this situation, where its "ultimate goal" is "that of vindicating the constitutionality of the Act."[12]

The court of appeals' conclusion relies on a misapprehension of the United States' trust relationship with Indian tribes.

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[12]The court of appeals' opinion also seems to suggest that the United States does not adequately represent the absent tribes' interests because its trust responsibilities towards the petitioners create a conflict of interest. App. A at 10a. Obviously, there is a conflict between petitioners and the United States - petitioners are suing the United States. However, the United States' only relevant duty, for Rule 19 purposes, is to defend the Act against petitioners' challenge; thus, its representation of the absent tribes is fully adequate under Rule 19, notwithstanding that the petitioners also are an Indian tribe and Native American individuals.

The court of appeals incorrectly presumes that a general trust responsibility towards all Indians, or at least all tribes (including the tribes to which petitioners belong), makes it impossible for the United States to represent the interests of two or more tribes at once in the same case. But the mere fact that there is a trust relationship between the United States and tribes does not, without more, create legal duties and responsibilities; instead, such duties must derive from unambiguous language in treaties, statutes, and/or regulations. *See United States v. Mitchell*, 463 U.S. 206, 211 *et seq.* (1983) (federal government's duty to pay Indian allottees whose timber was mismanaged arises from particular statues or regulations, not from general trust relationship between federal government and Indians.) The Hoopa-Yurok Settlement Act, the only relevant statute, contains no language creating trust obligations that put the United States in conflict with the absent tribes. The fact that the two absent tribes may disagree with each other on a variety of political matters changes nothing for Rule 19 purposes.[13]

The court of appeals' analysis of the United States' representation of the absent tribes is at odds with this Court's directions concerning the nature of the trust relationship between the United States and Indian tribes. It fundamentally misapprehends the source of the federal

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[13]Obviously, because of the Act's confiscatory provisions, the Yurok Tribe well might oppose it. Petitioners filed a motion in the district court to join the tribe as a defendant, so that the tribe's voice could be heard on this issue. However, the district court denied that motion, and the court of appeals affirmed the denial. The basic point remains that to the extent that the tribe supports the Act, the United States shares the same goal of upholding it in the face of petitioners' attack, so that for purposes of Rule 19, the United States adequately represents the Yurok Tribe.

When the litigation began in August, 1990, the Yurok Tribe had no official membership roll or officially recognized tribal government (although it was a federally-recognized tribe). Petitioners argued that due to this inability to litigate, it was not a "person subject to service of process" and therefore, Rule 19 did not apply to the Yurok Tribe. But, by the time the litigation had progressed to the court of appeals, the Yurok Tribe had organized a tribal government. Thus, the Yurok Tribe might have consented to be sued inasmuch as three of five members of the Yurok Tribe Interim Governing Council elected pursuant to 25 U.S.C. § 1300i-8(b)-(c) are petitioners herein. The court of appeals unfairly denied the Yurok Tribe a chance to be heard on whether or not it wanted to participate in this litigation, even after the tribe had organized so that its voice could be heard.

government's legal duties and responsibilities toward tribes.

V. THE COURT OF APPEALS' REFUSAL TO RECOGNIZE THAT THE HOOPA VALLEY TRIBE'S INTERESTS ARE PROTECTED BY ITS OFFICERS SETS A DANGEROUS PRECEDENT.

Finally, there can be no serious question that the Hoopa Valley Tribe is adequately represented by the four intervenor-defendants (respondents herein), who include its present Chairman, another present member of its governing council, and two former members of its governing council (who at the time of intervention in November, 1990, were council members). The motion to intevene itself is the best expression of the intevernors' desire to represent their tribe. That motion declared that their purpose was to " . . . put forth to this Court [the Hoopa intervenors'] views and positions with respect to . . . a matter posing a direct threat to the economic development and well-being of all tribal members." The motion described the "principal interests at issue in this case" as:

> The division of the Hoopa Valley Tribe and the Yurok Tribe's reservations and sums of money which the United States intends to pay the Hoopa Valley Tribe and the Yurok Tribe from the Settlement Fund. These are the matters in which Hoopa tribal members have a direct and substantial interest.

The motion continued:

> This action questions the statutorily-secured right of the Hoopa Valley Tribal Council - on which the Hoopa defendants serve-to rule over the affairs of its reservation. *(sic)*

These passages show that the Hoopa respondents perceive their interest to be peculiarly tribal in nature.

The motion to intervene belies any argument that Hoopa respondents do not represent the Hoopa Valley Tribe. So does their counterclaim that petitioners "[h]ave slandered the title of the Hoopa Valley Tribe . . ."[14] It is nonsense to suppose that, having intervened expressly to protect tribal interests, they do

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[14]The fact that this counterclaim was voluntarily dismissed (App. A at 7a, n. 2) does not support the claim that they are not participating in this action on the Hoopa Valley Tribe's behalf.

not sufficiently advance these interests for Rule 19 purposes. As in its discussion of the United States' role towards the absent tribes, the court of appeals substitutes conclusion for logical analysis in discussing the Hoopa respondents' role.

The court of appeals improperly speculated in concluding that a potential conflict prevented adequate representation when there is no actual conflict. The Hoopa respondents' counsel also represents the Hoopa Valley Tribe in *Short* and related matters; if there were really a conflict of interest, he could not do so. This is directly at odds with the conclusion which the court of appeals reached, App. A at 10a-11a, that a potential conflict of interest precludes these individual respondents from adequately representing the Hoopa Valley Tribe for Rule 19 purposes.

The court of appeals' ruling, based on speculation about potential conflicts when no actual conflict exists, sets a dangerous precedent. The unfairness inherent in its failure to hold that the Hoopa respondents adequately protect their tribe's interests is but one more example of the court of appeals' overall hostility towards judicial review of congressional enactments benefitting tribes, without regard to who is harmed by those same enactments.

CONCLUSION

If left standing, the court of appeals' decision will have national ramifications. The court of appeals essentially decided that Fed.R.Civ.P. 19 forecloses judical review of congressional enactments in Indian affairs, unless all the affected tribes consent to be sued. This is contrary to the purpose of Rule 19, which is to ensure a just adjudication. A writ of *certiorari* to the court of appeals should issue, reversing that court's decision.

March 23, 1993 Respectfully submitted,

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